MOTION FILED

APR 10 1997

(4)

No. 96-1570

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

NYNEX CORPORATION;
NYNEX MATERIAL ENTERPRISES COMPANY;
NEW YORK TELEPHONE COMPANY,

Petitioners,

— v. —

DISCON, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

RICHARD M. STEUER
425 Park Avenue, 12th Fl.
New York, New York 10022
(212) 836-8483

Attorney for Amicus Curiae
The Association of the Bar of
the City of New York

April 9, 1997

13 pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1570

NYNEX CORPORATION;
NYNEX MATERIAL ENTERPRISES COMPANY;
NEW YORK TELEPHONE COMPANY,

Petitioners,

— v. —

DISCON, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, this brief is respectfully submitted, in support of the Petition, by *amicus curiae,* the Association of the Bar of the City of New York. The consent of the parties to the filing of this brief has been requested. Petitioners have given consent; respondent has not.

INTEREST OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

The Association of the Bar of the City of New York (the "Association") is an organization composed of nearly 21,000 attorneys. While most members of the Association practice in the New York tri-state area, there are members from almost every state and from over 50 foreign countries. The Committee on Antitrust and Trade Regulation, which has participated in studying and shaping antitrust law and trade regulation policy for several decades, is comprised of lawyers with a wide range of perspectives. Members of the Committee include practitioners who represent both plaintiffs and defendants, as well as academicians.

The Second Circuit's August 26, 1996 decision in this matter was brought to the attention of the Association by one of the parties. The Association is concerned that this decision could cause serious confusion with respect to the distinction between horizontal and vertical restraints of trade under Section 1 of the Sherman Act, 15 U.S.C. §1.

Accordingly, the Association respectfully moves for leave to file the "Brief Amicus Curiae of the Association of the Bar of the City of New York in Support of the Petitioners" which is submitted herewith. The filing of this brief has been

approved by the President of the Association in accordance with Section XIII of the Association's by-laws.

Respectfully submitted,

/s/ Richard M. Steuer

RICHARD M. STEUER
425 Park Avenue, 12th Fl.
New York, New York 10022
(212) 836-8483

Attorney for Amicus Curiae
The Association of the Bar of
the City of New York

April 9, 1997

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

INTEREST OF AMICUS CURIAE 2

SUMMARY OF ARGUMENT 2

ARGUMENT 4

CONCLUSION 7

TABLE OF AUTHORITIES

FEDERAL CASES

Business Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988) 3, 5, 6

Oreck Corp. v. Whirlpool Corp., *579 F.2d 126 (2d Cir.) (en banc), cert. denied*, 439 U.S. 945 (1978) ..... 5 n. 1

White Motor Co. v. United States, 372 U.S. 253 (1963) ..... 5 n. 1

STATUTES

Sherman Act § 1, 15 U.S.C. § 1 ..... 2, 4

Sherman Act § 2, 15 U.S.C. § 2 ..... 7 n. 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1570

NYNEX CORPORATION;
NYNEX MATERIAL ENTERPRISES COMPANY;
NEW YORK TELEPHONE COMPANY,

Petitioners,

— v. —

DISCON, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK IN SUPPORT OF THE PETITIONERS

Pursuant to Rule 37 of the Rules of this Court, this brief is respectfully submitted, in support of the Petition, by *amicus curiae,* the Association of the Bar of the City of New York. The consent of the parties to the filing of this brief has been requested. Petitioners have given consent; respondent has not.

INTEREST OF *AMICUS CURIAE*

The Association of the Bar of the City of New York (the "Association") is an organization composed of nearly 21,000 attorneys. While most members of the Association practice in the New York tri-state area, there are members from almost every state and from over 50 foreign countries. The Committee on Antitrust and Trade Regulation, which has participated in studying and shaping antitrust law and trade regulation policy for several decades, is comprised of lawyers with a wide range of perspectives. Members of the Committee include practitioners who represent both plaintiffs and defendants, as well as academicians. The Committee, the Association and their members have a substantial interest in the Court's determination as to when a vertical agreement may be treated as a horizontal restraint under the Sherman Act.

SUMMARY OF ARGUMENT

Unless the Petition is granted in this case, the decision of the court of appeals for the Second Circuit with respect to the application of Section 1 of the Sherman Act will have the effect of allowing every supplier who is displaced by an agreement between a customer and a new supplier to seek treble damages based on a violation of the federal antitrust laws. Such suits would level claims of *per se* antitrust liability against lost customers, where the supplier otherwise would be limited to filing state law claims based on tortious interference against the new supplier. Because the *per se* rule presumes illegality, the defendants in these cases would be precluded from presenting evidence of justifications.

Of particular concern is the fact that the Second Circuit based its decision on court of appeals cases that were decided prior to this Court's decision in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717 (1988). Although the Second Circuit acknowledged the relevance of *Sharp*, it failed to recognize the fact that *Sharp* overruled the earlier authority under which a defendant's decision to substitute a new supplier or distributor for an old one could be treated as a horizontal restraint. For these reasons we urge this Court to grant the petition for certiorari in order to clarify the law regarding horizontal effects arising from vertical relationships.

ARGUMENT

The Association respectfully submits the following comments in support of the pending petition for a writ of certiorari in this matter.

Without expressing an opinion on either the appropriate resolution of the motion to dismiss that is the subject of the present appeal, or the ultimate outcome of this litigation, the Association urges the Court to grant the petition for a writ of certiorari and to decide the issue of the applicability of Section 1 of the Sherman Act, 15 U.S.C. § 1, to what the Court of Appeals for the Second Circuit termed "two-firm group boycotts." Slip. Op. at 7236. The Association's concern is that the Second Circuit's broad formulation as to when a vertical agreement may be treated as a horizontal restraint, crafted *sua sponte* without the benefit of briefing or argument by the parties, and without a full explanation of how it fits within applicable Supreme Court precedent, will have a powerful influence beyond this particular case.

The Second Circuit's decision with respect to the application of Section 1 of the Sherman Act turns on the proposition that an agreement between two firms in a vertical relationship may be characterized as a horizontal restraint if it seeks to disadvantage a competitor of one of the parties to the agreement and has no purpose except stifling competition. Specifically, the Second Circuit observed that "an agreement between two firms . . . even in a vertical relationship, may be characterized as a horizontal restraint of trade if the agreement seeks to disadvantage the direct competitor . . . of one of the conspiring firms," and the court added that such a restraint might fall within "the *per se* rule applied to group boycotts

. . . if the restraint of trade 'has no purpose except stifling competition.'"[1]

The concern raised by this formulation is that it could be interpreted to reach virtually every agreement between a customer and a supplier that displaces another supplier. This would invite a flood of federal antitrust litigation seeking treble damages on behalf of jilted suppliers. These suits would assert claims of *per se* antitrust liability against lost customers in situations where, at most, the disappointed supplier otherwise would be limited to pursuing a state law claim against the substituted supplier for tortious interference with business relationships and/or unfair competition. Because the *per se* rule presumes illegality, defendants in these suits would be precluded from presenting evidence of justifications.

What makes the Second Circuit's ruling particularly significant is the fact that it is based on *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir.) (*en banc*), *cert. denied*, 439 U.S. 945 (1978), and other cases which were decided before this Court's decision in *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 725-31 & n.4 (1988). Although the Second Circuit's opinion acknowledged the relevance of *Sharp*, it did not recognize that *Sharp* overruled the earlier authority under which a defendant's decision to substitute a new supplier or distributor could be treated as a horizontal restraint. This Court explained in *Sharp* that "a restraint is horizontal not because it has horizontal effects, but

---

[1] Slip. op. at 7237, *citing* Oreck Corp. v. Whirlpool Corp., 579 F.2d 126, at 131 (2d Cir.) (*en banc*), *cert. denied*, 439 U.S. 945 (1978), *quoting* White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

because it is the product of a horizontal agreement" (*i.e.*, an agreement "between competitors"). 485 U.S. at 730, and n.4. Further, the majority in *Sharp* explicitly admonished that applying the horizontal label to vertical agreements "introduces needless confusion into antitrust terminology." *Id.* at 730.

The opinion below should be reexamined precisely because it introduces needless confusion by treating a vertical restraint as horizontal on the ground that it has horizontal effects.

CONCLUSION

Wherefore, the Association respectfully submits that the petition for writ of certiorari should be granted.[2]

Respectfully submitted,

RICHARD M. STEUER
425 Park Avenue, 12th Fl.
New York, New York 10022
(212) 836-8483

Chair, Committee on Antitrust
and Trade Regulation
Attorney for Amicus Curiae
The Association of the Bar
of the City of New York

April 9, 1997

---

[2] Granting the petition for writ of certiorari would also afford this Court the opportunity to review the Second Circuit's holding that a conspiracy to monopolize claim against a customer under Section 2 of the Sherman Act, 15 U.S.C. § 2, can be based on a vertical agreement between the customer and a new supplier which displaces a previous supplier.